Supreme Court, U.S.
FILED
APR 11 1991
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(5)

No. 90-584

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
VS.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 9, 1990
CERTIORARI GRANTED FEBRUARY 25, 1991

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Sept. 30, 1987 — Gizoni complaint and summons filed in U.S. District Court for the Southern District of California.

Feb. 4, 1988 — Southwest Marine, Inc. ("Southwest Marine") answer to complaint for damages and demand for jury trial filed.

June 7, 1988 — Southwest Marine notice of motion and motion for summary judgment filed.

June 17, 1988 — Gizoni memorandum of points and authorities in opposition to motion for summary judgment filed.

June 27, 1988 — Southwest Marine reply to Gizoni's opposition to motion for summary judgment filed.

Sept. 15, 1988 — Order for entry of summary judgment issued.

Sept. 29, 1988 — Gizoni notice of appeal filed with Ninth Circuit.

Feb. 28, 1989 — Gizoni opening brief filed.

Mar. 15, 1989 — Gizoni motion to supplement the record filed.

Mar. 16, 1989 — Gizoni notice of related cases (Rule 28.2.6) filed.

May 22, 1989 — Southwest Marine motion for leave to file brief of an *amicus curiae* filed.

May 22, 1989 — Brief of *amicus curiae* filed.

May 22, 1989 — Southwest Marine supplemental excerpts of record filed.

May 22, 1989 — Brief of Southwest Marine filed.

July 5, 1989 — Gizoni reply brief filed.

July 7, 1989 — Motion to file brief of Shipbuilders Council of America is granted.

Sept. 17, 1990 — Mandate issued.

The Jones Act, 46 U.S.C. § 688(a):

(a) Application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3):

> The term "employee" means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include —
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> • • •
>
> (G) a master or member of a crew of any vessel;
>
> • • •

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a):

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a):

> The liability of an employer prescribed in section 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b):

> The event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsecton shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Case Number 87-1424GT(CM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BYRON GIZONI,
Plaintiff,
v.
SOUTHWEST MARINE, INC.,
Defendant.

To:
SOUTHWEST MARINE, INC.

SUMMONS IN A CIVIL ACTION

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PRESTON EASLEY, ESQ.
150 West Seventh Street, Suite 203
San Pedro, California 90731

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service, if you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

October 6, 1987

WILLIAM W. LUDDY,
Clerk

C. LeBaron,
Deputy Clerk

PRESTON EASLEY
Attorney at Law

150 West Seventh Street, Suite 203
San Pedro, California 90731
(213) 832-5315

ATTORNEY FOR: Plaintiff
BYRON GIZONI

CASE NO.: 871424 GT(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BYRON GIZONI,
Plaintiff,
v.
SOUTHWEST MARINE, INC.
Defendant.

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

COMES NOW PLAINTIFF BYRON GIZONI and complains of defendant and alleges:

FIRST CAUSE OF ACTION FOR NEGLIGENCE

1. Federal jurisdiction is asserted in this matter pursuant to the Jones Act, 46 U.S.C. Sec. 688.

2. At all times mentioned herein defendant SOUTHWEST MARINE, INC., hereinafter referred to as "SOUTHWEST MARINE" was and now is a corporation duly organized and existing under and by the virtue of the laws of the state of California and is now and has been at all times mentioned herein doing business in the State

of California, with its principal place of business in San Diego, California.

3. During all times herein mentioned defendant SOUTHWEST MARINE owned, operated, managed, possessed and controlled a group of vessels including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge in navigable waters.

4. Said group of vessels were and are used to transport, maintain, and store ship repair equipment and parts in order to aid defendant in performing ship repair activities on various vessels in San Diego Harbor.

5. At all times mentioned herein plaintiff was a rigging foreman and was permanently assigned to said group of vessels and was therefore a Jones Act seaman pursuant to 46 U.S.C. Sec. 688.

6. On or about April 6, 1987, plaintiff was working aboard one of defendant's pontoon barges at approximately 3:30 A.M. on a rigging job involving the rudder of the USS WABASH, a U.S. Navy vessel which was undergoing repairs at defendant's shipyard at the foot of Sampson Street, San Diego, California. Said pontoon barge was in navigable waters.

7. While working on said pontoon barge on or about 3:30 A.M., April 6, 1987, plaintiff sustained serious injuries to his legs, back, and left wrist when a ⅛ inch thick piece of loose scrap wood covering a hole in the deck gave way and plaintiff fell through the hole into the water below.

8. Defendant negligently failed to provide adequate coverings over the hole in the deck of said pontoon barge.

9. As a proximate result of defendant's negligence plaintiff was hurt and injured in his health, strength, and

activity, sustaining injury to his nervous system and person, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. Plaintiff is informed and believes and thereon alleges that such injuries will result in permanent disability to him. Plaintiff is unable to return to his prior employment as a rigging foreman.

10. As a further proximate result of defendant's negligence, plaintiff has incurred and will continue to incur, medical and related expenses. The full amount is not known at this time, and plaintiff will move to amend this complaint to state such amount when the same becomes known to him, on proof thereof.

11. As a further proximate result of defendant's negligence, plaintiff's earning capacity has been greatly impaired, both in the past and present. The exact amount is not known to plaintiff at this time, and plaintiff will move to amend this complaint to state such amount when the same becomes known to him on proof thereof.

SECOND CAUSE OF ACTION FOR UNSEAWORTHINESS

12. Plaintiff incorporates by reference as though fully set forth below each and every allegation of Paragraphs 1 through 11 of the First Cause of Action herein.

13. On or about April 6, 1987, while said pontoon barge was on navigable waters at the foot of Sampson Street, San Diego, California, plaintiff was working aboard said barge as a rigging foreman. Defendant failed to provide plaintiff with a seaworthy vessel in that a hole in the deck of said barge was covered by a piece of scrap wood which gave way when plaintiff stepped on it. As a result of the unseaworthiness of defendant's vessel plaintiff suffered the serious bodily injuries alleged above.

THIRD CAUSE OF ACTION FOR MAINTENANCE AND CURE

14. Plaintiff incorporates by reference as though fully set forth below, each and every allegation of paragraphs 1 through 13 of the First and Second Causes of Action herein.

15. On or about April 6, 1987 plaintiff suffered a disabling condition when a piece of scrap wood covering a hole on defendant's barge gave way and plaintiff fell through the hole.

16. Immediately prior to suffering this condition, plaintiff was a strong, able-bodied person, capable of continous gainful employment in the occupation of rigging foreman. By reason of this disabling condition, plaintiff has been caused to suffer great physical and mental pain and suffering, has incurred and will continue to incur medical and related expenses, and is unable and will continue to be unable to attend his usual occupation as a rigging foreman.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

2. For damages for medical and related expenses according to proof;

3. For damages for lost earnings, both past and future, according to proof;

4. For an amount representing plaintiff's maintenance and cure, according to proof;

5. For costs of suit herein incurred; and

6. For such other and further relief as the Court may deem proper.

DATED: September 28, 1987

PRESTON EASLEY
Attorney at Law

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury in this action.

DATED: September 28, 1987

PRESTON EASLEY
Attorney at Law

JAMES J. McMULLEN, JR., ESQ.
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
701 "B" Street, Suite 300
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Telephone: (619) 232-0441
Attorneys for Defendant
SOUTHWEST MARINE, INC.

Case No.: 871424 GT (CM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BYRON GIZONI,
Plaintiff
v.
SOUTHWEST MARINE, INC.,
Defendant.

ANSWER TO COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

COMES NOW, Defendant, SOUTHWEST MARINE, INC. ("Southwest Marine"), a corporation, in answer to Plaintiff's Complaint filed herein, admits, denies and alleges as follows:

FIRST CAUSE OF ACTION

1. Southwest Marine denies each and every allegation of Paragraph No. 1, and specifically denies that this Court has subject matter jurisdiction over this claim pursuant to the Jones Act, 46 U.S.C. § 688, or otherwise.

2. Southwest Marine admits it is a duly organized corporation doing business within the State of California.

3. Southwest Marine admits that, on occasion, vessels positioning floating platforms are used to aide in ship repair activities performed at its yard in San Diego. Southwest Marine denies each and every allegation of Paragraph Nos. 3 and 4.

4. Southwest Marine admits that Plaintiff was employed at Southwest Marine as a rigging foreman. Southwest Marine denies each and every other allegation of Paragraph No. 5, and specifically denies that Plaintiff was permanently assigned to any group of vessels.

5. Southwest Marine admits that Plaintiff was transiting a pontoon barge at the time he alleges he was injured. Southwest Marine also admits that repairs were being performed on the rudder of the U.S.S. Wabash. Southwest Marine denies each and every other allegation of Paragraph No. 6.

6. Southwest Marine denies each and every allegation of Paragraph No. 7 and specifically denies that Claimant sustained any injury.

7. Southwest Marine specifically denies each and every allegation of Paragraph Nos. 8, 9, 10 and 11, and specifically denies that Plaintiff was injured or damaged in any sum or sums at all.

SECOND CAUSE OF ACTION

8. Southwest Marine incorporates by reference its answers to Plaintiff's allegations contained in the First Cause of Action to the Complaint herein, which Plaintiff deems relevant and realleges in Paragraph No. 12 of the Complaint.

9. Southwest Marine denies each and every allegation of Paragraph No. 13.

THIRD CAUSE OF ACTION

10. Southwest Marine incorporates by reference its answers to Plaintiff's allegations contained in the First and Second Causes of Action to the Complaint herein, which Plaintiff deems relevant and realleges in Paragraph No. 14 of the Complaint.

11. Southwest Marine denies each and every allegation of Paragraph No. 15.

12. Southwest Marine denies each and every allegation of Paragraph No. 16, and specifically denies that Plaintiff has sustained any injury or damage at all.

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint, and each cause of action thereof, fails to state facts sufficient to constitute a cause of action as against this Defendant; furthermore, this Defendant alleges that Plaintiff cannot prove such facts even if properly alleged in the Complaint.

SECOND AFFIRMATIVE DEFENSE

If any injuries were sustained by Plaintiff at or about the time alleged in the Complaint, which is expressly denied, they were caused solely and proximately by the carelessness and negligence of Plaintiff, in that Plaintiff then failed to exercise reasonable care for his own health and safety and failed to use the care, skill and experience of a reasonably competent seaman.

THIRD AFFIRMATIVE DEFENSE

Any and all acts, happenings and/or damages, if any, referred to in Plaintiff's Complaint, were proximately caused by and contributed to by the negligence of Plaintiff and, therefore, Plaintiff is completely barred from recovery herein, or in the alternative, under the doctrine of Comparative Negligence, the negligence of Plaintiff reduces his right to recovery herein by that amount which said negligence contributed to the incident as alleged.

FOURTH AFFIRMATIVE DEFENSE

If any injuries were sustained by Plaintiff at or about the time alleged in the Complaint, which is expressly denied, they were caused solely and proximately by a known and recognized peril of the sea over which Defendant had no control and for which Defendant is not liable in tort.

FIFTH AFFIRMATIVE DEFENSE

If any equipment, tackle or tool broke and thereby contributed to causing Plaintiff's injuries, which is expressly denied, such breaking or failure was due to forces beyond Defendant's control and due to conduct of other parties and non-parties.

SIXTH AFFIRMATIVE DEFENSE

If Plaintiff sustained any losses, which losses are specifically denied, Defendant is not responsible for such losses as they were caused by Plaintiff's own willful failure to follow the directives of superiors.

SEVENTH AFFIRMATIVE DEFENSE

If any injuries were sustained by Plaintiff, which is expressly denied, they were caused solely and/or proximately by the natural progression of a pre-existing medical condition over which Defendant had no control and for which Defendant is not liable.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's injury, if any, was caused or contributed to by the negligence of the third parties whose identities are presently unknown to Defendant, and Defendant's liability, if any, should be reduced by the proportion caused or contributed by such persons.

NINTH AFFIRMATIVE DEFENSE

Plaintiff is barred from asserting any claim against the Defendant by reason of the applicable statutes of limitation.

TENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from asserting the claim herein against this Defendant by the doctrines of laches, estoppel and waiver.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's Complaint, and each cause of action thereof, is barred because Plaintiff comes to this Court with unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery in this lawsuit in that Plaintiff has not properly performed his duties which are conditions precedent to the accrual of any claim, and because Plaintiff has not dealt with this Defendant fairly and in good faith.

THIRTEENTH AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over the claims presented herein. Furthermore, Claimant is barred from bringing this action by the exclusive remedy provisions of the Longshore and Harbor Workers' Compensation Act, and any other applicable workers' compensation statutes.

WHEREFORE, this Defendant prays that Plaintiff's Complaint be dismissed; that judgment be entered for said Defendant and against Plaintiff; that Defendant recover from Plaintiff its costs of suit incurred herein, attorney's fees, punitive relief as to the Court may seem just and proper in the premises.

DATED: February 2, 1987.

LITTLER, MENDELSON,
FASTIFF & TICHY
A Professional Corporation

By: JAMES J. McMULLEN, JR.
James J. McMullen, Jr.
Attorneys for Defendant

CERTIFICATE OF SERVICE

I, BARBARA HALLMAN, declare that I am a citizen of the United States and employed in the City of San Diego, County of San Diego, California. I am over the age of 18 years and not a party to the within entitled action. My business address is 701 "B" Street, Suite 300, San Diego, California 92101.

On February 4, 1988, I caused a copy of the Answer to Complaint For Damages and Demand For Jury Trial to be mailed by depositing same with the United States Postal Service, by placing same in a postage prepaid envelope, addressed as follows:

Preston Easley, Esq.
Law Offices of Preston Easley
150 West Seventh Street, Suite 203
San Pedro, California 90731

I, BARBARA HALLMAN, declare under penalty of perjury, that the foregoing is true and correct.

Executed on February 4, 1988, at San Diego, California.

BARBARA HALLMAN

BARBARA HALLMAN